

September 28, 1992

CD-92-13 (LDV,HD,MC,SMV,ICI,LIMO)

Dear Manufacturer:

Subject: Access to Confidential Business Information (CBI) by Senior Environmental Enrollee's

This letter concerns EPA's use of personnel under the Senior Environmental Enrollee (SEE) program. This program is operated in conjunction with the National Council of Senior Citizens as a grant program. The purpose of this program is to provide employment opportunities for senior citizens, and to provide EPA with valuable resources at a lower cost to the Agency. To take full advantage of these resources, thereby increasing our efficiency and responsiveness, it is necessary that SEE's have access to confidential business information that is submitted by your company to EPA in the course of operating the certification and fuel economy programs.

The EPA's Office of General Counsel has recently ruled that even though Section 208(c) of the Clean Air Act permits the Administrator to disclose CBI to any authorized representative of the United States Government EPA regulations limit the scope of authorized representatives to contractors and state and local governmental agencies. In order to review certification information, EPA needs to provide CBI to individuals participating in the Senior Environmental Enrollee (SEE) program. The SEE program is authorized by the Environmental Programs Assistance Act of 1984 (PL 98-313), which provides that the EPA Administrator may "make grants or enter into cooperative agreements" for the purpose of "providing technical assistance to Federal, State, and local environmental agencies for projects of pollution prevention, abatement, and control." Several SEE enrollees assist the Certification Division with its work.

Because SEE enrollees are not contractors, they do not fit in with the Agency's definition of "authorized representative" (EPA will take the necessary regulatory action to resolve this issue in the near future). Therefore, consistent with the enclosed letter from Patricia Powers addressed to our SEE monitors dated September 14, 1992, EPA has ceased using SEE employees to process and review information classified as CBI.

We hope the disruptions will be of short duration. That is, we anticipate that a regulatory change will be put into place such that each manufacturer will not have to provide a written notice. Until this occurs we are compelled to

implement the following change in day-to-day operations within the Certification Division.

Until regulations allowing SEEs to handle CBI are in place, all information eligible to be classified as CBI must be explicitly identified as CBI and be enclosed in a sealed envelope marked "Confidential." Further, to assist in maintaining an adequate mail control log, the confidential envelope should have affixed to it keywords identifying the material. For example, Section 08.00 for engine family XYZ. In addition, a new procedure for scheduling test vehicles is being implemented to remove any information that could be considered CBI. We cannot practically prevent SEE's from having access to CBI which you submit in open form (not in a sealed envelope or via FAX.) Hence, we will consider that you have given permission for SEE's to process and review such open information. Even then, we will strive to secure such information as quickly as possible to limit its access to SEE's.

Even with these measures, denying SEE's access to CBI will be very disruptive to your certification process. This includes the normal routing of incoming mail as currently six of our eight secretary/clerical staff are SEE's in the Certification Division. Additionally, we currently have four SEE's who assist in the day-to-day processing and routine analysis of certification and fuel economy data plus perform test scheduling tasks. Given that most certification and fuel economy information can be classified as CBI until the vehicles are introduced into commerce, we are losing a significant portion of our effective certification administrative support. Not only will this be very inconvenient for us, we also expect this new policy will significantly disrupt turnaround-time on certification and fuel economy actions.

In order to allow SEE enrollees to assist the Certification Division and Engineering Operations Division (and enable the certification review process to meet its previous timetable) EPA needs the written authorization from each manufacturer for access to CBI by SEE enrollees. Once this written authorization is received the SEE's will be able to resume their assistance in day-to-day processing and routine review of certification and fuel economy information. To authorize access, please complete and sign the enclosed authorization form and return it to me at the earliest possible date.

In a related matter, EPA can give access to contractors now under the provision of Sections 40 CFR 2.301 and 2.311. This action does not require specific written consent. A Federal Register NOTICE giving formal notice of which of our contractors have been granted access, on a need-to-know basis, to confidential business information will be published in the near future.

Sincerely,

Robert E. Maxwell, Director  
Certification Division  
Office of Mobile Sources

Enclosures

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To authorize access, please sign the following:

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(Company Name)

authorizes participants in the Senior Environmental Enrollee program to have access, on a need-to-know basis, to its confidential business information submitted to the U.S. Environmental Protection Agency.

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(Name)

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(Date)

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(Title)

Please return this authorization at the earliest possible date.

(Note -- this letter was not scannable - therefore, retyped)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460  
September 14, 1992

MEMORANDUM

SUBJECT: Access to Confidential Business Information by Persons Working Under the Senior Environmental Employment (SEE) Program

FROM: Patricia Powers  
National Program Director  
Senior Environmental Employment Program

TO: SEE Coordinators & SEE Monitors

Recently, the Office of General Counsel has advised us that some of the access to Confidential Business Information (CBI) by SEE Enrollees is in violation of the Trade Secrets Act. Therefore, all access to EPA Confidential Business Information by SEE Enrollees must cease immediately. It is a criminal offense for a EPA employee to give Confidential Business Information to a SEE Enrollee. The purpose of this memorandum is to assist you in implementing this directive.

When the United States Congress established the Senior Environmental Employment Program under Public Law 98-313 (in 1984) and made it a unique and model program for the Federal Government, it did not address every operational detail for implementing the program. Since that time, the sense of Congress in terms of implementing the program has been set forth in special Congressional Legislation, Reports and excerpts from the Congressional Record.

For example, when the agency was recently reviewing its contractor relationships and activities, the Congress went on record to point out that SEE Enrollees were not to be considered in the same class as contractor employees. Specifically, a Congressional Report stated that, in terms of inherently governmental functions, SEE Enrollees were exempt. In terms of the strict division that is currently being established between EPA Government Employees and Contractor Employees, the Congress stated that SEE Enrollees were not to be included:

*The Committee wishes to reemphasize that the  
SEE Program should not be subject to work  
restrictions or limitations placed on contractors and  
contract employees.*

*EPA Senate Appropriations Report 102-356*

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Now, it has come to my attention, in a written opinion from the Office of General Counsel (attached) that SEE Enrollees are not authorized to receive Confidential Business Information (CBI) during the course of their day-to-day activities from Federal employees. Furthermore, to provide CBI to SEE enrollees may be a violation of the Trade Secrets Act, a criminal statute. The only exception is trade secret information collected under the Emergency Planning and Community Right-to-Know Act (EPCRA, also known as SARA Title III). *(Please see Footnote on page three.)*

My office and OGC have discussed potential solutions to the problem, which include changes to EPA regulations and provisions in Agency contracts allowing disclosure of contractor CBI to SEE Enrollees. Although OGC has placed those actions at the top of their immediate "to do" list, they are uncertain as to how quickly those changes can be implemented.

The most immediate and effective resolution is a statutory amendment to the SEE program to correct this oversight. OGC and I have already drafted legislative language to resolve this matter and the agency is fully supporting our efforts to get this amendment passed. Nonetheless, as no solution can yet be implemented, effective immediately, SEE enrollee access to CBI must cease (except for EPCRA trade secret information).

I realize that this will have significant impact on both the operations of your office and the enrollees themselves. Where this is the case, I urge you to consider the following options:

Restructure the duties of the enrollees or modify the procedures in your office so that the enrollees perform the same Level of responsibility with non-CBI materials only.

Have a federal employee perform the duties currently performed by the enrollee, and find duties for the enrollee which do not involve access to CBI.

In limited circumstances, obtain consent from the CBI submitter to access by enrollees. Please consult with OGC (Don Sadowsky, 202-260-5469) before requesting consent.

Should you conclude that you are unable to make use of SEE enrollees if they cannot have access to CBI, please contact me before you take any action.

To assist you in assessing the impact on your office, I am attaching a guide to CBI written by the Office of General Counsel.

Should you have any questions with respect to this memorandum, please call me at (202) 260-2573.

Attachments

cc: Assistant Administrators  
Regional Administrators  
Laboratory Directors  
SEE Cooperative Agreement Organizations

*Footnote: Even in this case, access may only be granted where the Agency has followed the procedures in 40 CFR §350.23, which include prior notice to submitters of trade secret information. The only persons which have been authorized in this manner to receive EPCRA trade secret information are those working under American Association of Retired Persons cooperative agreement no. CQ-816529 or National Council of Senior Citizens cooperative agreement no. CQ-819705.*